FOR ARGUMENT

IN THE

Supreme Court of the United States

October Term, 1978

Supreme Court, U. S.
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Nos. 78-432, 78-435 and 78-43

UNITED STEELWORKERS OF AMERICA, [illegible]-CIO-CLC,
Petitioner,

v.

BRIAN F. WEBER, *et al.*,
Respondents.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

v.

BRIAN F. WEBER, *et al.*,
Respondents.

UNITED STATES OF AMERICA and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

v.

BRIAN F. WEBER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICI CURIAE* OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH; HELLENIC BAR ASSOCIATION OF ILLINOIS; INSTITUTE FOR LIBERTY AND JUSTICE — ORDER OF SONS OF ITALY IN AMERICA, INC.; NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"); UKRAINIAN CONGRESS COMMITTEE OF AMERICA (CHICAGO DIVISION) AND UNICO NATIONAL

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No. 78-436

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BRIEF *AMICI CURIAE* OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH; HELLENIC BAR ASSOCIATION OF ILLINOIS; INSTITUTE FOR LIBERTY AND JUSTICE — ORDER OF SONS OF ITALY IN AMERICA, INC.; NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"); UKRAINIAN CONGRESS COMMITTEE OF AMERICA (CHICAGO DIVISION) AND UNICO NATIONAL

Amici respectfully submit that the judgment of the United States Court of Appeals for the Fifth Circuit in the above-captioned cases should be affirmed.

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 563 F.2d 216 (1977); rehearing was denied by that Court as reported at 571 F.2d 337 (1978). The opinion of the United States District Court for the Eastern District of Louisiana is reported at 415 F. Supp. 761 (1977).

Jurisdiction

The jurisdiction of this Court was invoked under 28 U.S.C. §1254.

Consent of Parties

Petitioners and Respondent have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court.

Interest of *Amici Curiae*

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all races and creeds and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally interested in protecting the civil rights of all persons and in assuring that every individual receives equal treatment under law regardless of his race or religion.

Among its other activities directed to these ends, the Anti-Defamation League has filed briefs *amicus curiae* urging the unconstitutionality or illegality of racially discriminatory laws or practices in such cases as *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Colorado Anti-Discrimination Commission* v. *Continental Airlines, Inc.*, 372 U.S. 714 (1963); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969); *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973); *De Funis* v. *Odegaard*, 416 U.S. 312 (1974); *Runyon* v. *McCrary*, 427 U.S. 160 (1976); *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Regents of University of California* v. *Bakke*, 98 S. Ct. 2733 (1978); and *County of Los Angeles* v. *Van Davis*, O.T. 1978, No. 77-1533, now pending decision in this Court after briefing and argument.

The Hellenic Bar Association of Illinois is an organization of attorneys in that state of Greek extraction or

descent. Its essential purpose is to foster better relations between attorneys and the communities which they serve.

The Institute for Liberty and Justice—Order of Sons of Italy in America, Inc. is a fraternal organization of approximately 95,000 members belonging to 22 Grand Lodges in 24 states. All persons of Italian birth or descent, or persons adopted by those of Italian lineage, and their spouses are eligible for membership in the organization. One of the principal purposes of the organization is to participate in the political, social and civic life of the community and in particular to strive toward fair and equal treatment of all individuals regardless of race or national origin.

The National Jewish Commission on Law and Public Affairs ("COLPA") is a voluntary association of attorneys and social scientists organized to combat discrimination and is committed to securing the right of observant Jews, along with other Americans, to equality of opportunity. COLPA is the principal non-governmental agency involved in the protection of the legal rights of observant Jews. COLPA has appeared in that capacity before numerous courts, including this honorable Court. COLPA represents the following organizations on public legal issues: Agudath Israel of America, The Rabbinical Council of America and the Union of Orthodox Jewish Congregations of America.

The Ukrainian Congress Committee of America, Chicago Division, is an umbrella organization of all Ukrainian-American civic, church, educational, cultural, sports and youth organizations in the Chicago metropolitan area. The organization represents the interests of the Ukrainian community at the city, state and federal government levels and is also engaged in charitable activities by assisting needy immigrants.

UNICO National is the nation's largest Italian-American community service and public affairs organization, with 140 chapters throughout the United States. UNICO National represents approximately 50,000 people and has as its objectives to foster, encourage and promote the Italian heritage and culture as a creative force for the good of all Americans and to enhance the interest of each member in the public welfare of his community. UNICO National is 55 years old and has been active in the areas of scholarship, aid to the physically handicapped, and the fostering of research in the afflictions of mental health.

The *Amici Curiae* are particularly concerned about the use of racial quotas, the "numerus clausus," because of the historically documented evils that are necessary corollaries of their use. It is just such a "numerus clausus" that is at issue in this case.

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the Constitution of the United States provides, *inter alia*:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

The Fourteenth Amendment to the Constitution of the United States provides, *inter alia*:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a) provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(d) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(d), provides:

> (d) It shall be an unlawful employment practice for any employer, labor organization, or joint-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Section 703(j) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(j) provides:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Executive Order No. 11246, 30 Fed. Reg. 12319 (1965), in relevant part, reads:

> The contractor will take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin.

Questions Presented

1. Can a collective bargaining agreement impose racial quotas prohibited by Title VII?

2. Can racial quotas be imposed pursuant to an Executive Order but in conflict with a Congressional statute?

Statement

The facts of this case are not disputable. They are established by the findings of the United States District Court for the Eastern District of Louisiana, 415 F. Supp. 761, which were affirmed by the United States Court of Appeals for the Fifth Circuit, 563 F.2d 216. Although the Court of Appeals was divided two-to-one on the propriety of the judgment based on these facts, there was no disagreement between the majority and the minority about the facts. "The majority accurately and completely presents the facts of this case." *Weber* v. *Kaiser Aluminum and Chemical Corp.*, 563 F.2d 216, 228 (5th Cir. 1977) (Wisdom, J., dissenting). This Court's "two-court" rule properly forecloses it from engaging in fact-finding *ab initio*, as Petitioners would have it do. See, *e.g.*, *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 342-43 (1977); *Corn Products Refining Co.* v. *Commissioner*, 350 U.S. 46, 51 (1956); *Faulkner* v. *Gibbs*, 338 U.S. 267 (1949); *Comstock* v. *Group of Investors*, 335 U.S. 211, 214 (1948); *United States* v. *Dickinson*, 331 U.S. 745, 751 (1947); *Allen* v. *Trust Co. of Georgia*, 326 U.S. 630, 636 (1946). In any event, there are no facts of record to warrant any such inconsistent findings as the Petitioners would have this Court make.

The relevant facts are clear. Respondent Weber is a white employee at Petitioner Kaiser Aluminum & Chemical Corp.'s ("Kaiser") Gramercy Works in Louisiana. He was an applicant for an on-the-job training program which used plant seniority as its preeminent nonracial qualifying factor. But, pursuant to a 1974 agreement between Petitioner Kaiser and Petitioner United Steelworkers of America ("Steelworkers"), separate racially segregated seniority lists were to be used for this purpose and only this purpose. An "entrance ratio" of one minority worker to one white worker was established for the program and was to continue until there was 39% minority representation in each craft. This figure was chosen because of its relation to the number of blacks in the area surrounding the plant.* As a result of this 50% quota, Weber's admission was denied. A black employee with less seniority was admitted to the program from which Weber was excluded solely because of his race.

"[T]he black employees being preferred over more senior employees had never themselves been the subject of any unlawful discrimination during hiring, they occupied their 'rightful place' in the plant." *Weber* v. *Kaiser Aluminum and Chemical Corp.*, 415 F. Supp. 761, 769 (E.D. La. 1977). "... Kaiser began to hire new employees 'at the gate' on a 'one white, one black' basis in 1969. The evidence further established that Kaiser had a non-discriminatory hiring policy from the time its Gramercy plant opened in 1958, and that none of its black employees who were offered on-the-job training opportunities over more senior white employees pursuant to the 1974 Labor Agreement had been the subject of any prior employment discrimination by Kaiser." *id.* at 764.

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* There is a conflict in the opinions below as to whether the 39% figure represented "the percentage of minority population in the area surrounding [the] plant", *Weber*, 563 F.2d at 218, or whether it represented the percentage of the total minority work force in the surrounding area. *Id.* at 228. In either event the 39% figure was grossly in excess of the percentage of minority craft workers in the surrounding area.

There was a discrepancy between the proportion of blacks in the craft work force and the blacks in the plant as a whole, and between the proportion of blacks in the craft work force and the blacks in the community work force. But this discrepancy was not attributable to any racial discrimination by employer or union. ". . . Kaiser had vigorously sought trained black craftsmen from the general community. Although its efforts to secure such trained employees included advertising in periodicals and newspapers published primarily for black subscribers, Kaiser found it difficult, if not impossible, to attract trained black craftsmen." *id.* at 764.

On these facts, the trial court ruled that the clear violation of Weber's rights under Title VII, §§703(a) and 703 (d), 42 U.S.C. §§2000e-2(a) and 2000e-2(d), to be treated without discrimination on grounds of race could not be justified or excused by any prior racial discrimination by Kaiser. It granted Weber's request to enjoin the use of the racial quota as a barrier to access to on-the-job training.

The Court of Appeals affirmed, holding: "It is undeniable that the 1974 Labor Agreement's one-for-one ratio for training eligibility discriminates on the basis of race." *Weber,* 563 F.2d at 223. "There can be no basis for preferring minority workers if there has been no discriminatory act that displaced them from their 'rightful place' in the employment scheme." *id.* at 221.

This Court granted petitions for certiorari, Mr. Justice Stevens not participating, —— U.S. ——, (1978).

Summary of Argument

Title VII clearly established Weber's right to nondiscriminatory treatment as a candidate for on-the-job training. "Any dual seniority arrangement or quota system based on race could only have resulted in unlawful discrimination against those white employees with greater seniority." *Weber,* 415 F. Supp. at 769. "It is undeniable that the 1974 Labor Agreement's one-for-one ratio for training eligibility discriminates on the basis of race." *Weber,* 563 F.2d at 223.

The patent violation of Title VII cannot be justified either by the collective bargaining agreement or by Executive Order No. 11246, especially in the absence of any antecedent racial discrimination that had prejudiced the black applicants who were preferred over the white applicants. The attempted insertion of Executive Order No. 11246 as a basis for disregarding the specific mandate of Title VII raises serious constitutional questions which may be avoided by giving Title VII the plain meaning that the statutory language demands.

ARGUMENT

I

Title VII Prohibited Respondent's Exclusion From the On-the-Job Training Program Solely Because of His Race.

The record is clear that Respondent, because he is white, was denied admission to the on-the-job training program for which he was an applicant. Had he been black he would have been admitted. The segregation of employees by race for evaluating seniority qualifications was the sole cause of his exclusion.

It is equally clear that Title VII by its terms forbids the disqualification imposed on Weber because of his race. Section 703(a) and Section 703(d) are unambiguous in damning the exclusion of Weber as the segregatory racial quota did. Section 703(a) provides, in part:

> It shall be an unlawful employment practice for an employer—
>
> . . . to discriminate against any individual with respect to his compensation, terms, conditions of employment, because of such individual's race . . .; or . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race . . .

Section 703(d) makes clear that this ban on racial classification by an employer is forbidden as to "apprenticeship or other training or retraining programs."

As the statutory language says, the right conferred on Weber not to be discriminated against on grounds of race was conferred on him as an individual and not as a member of a class. "The statute makes it unlawful 'to discriminate against any *individual* with respect to his compensation, terms, conditions or privileges of employment, because of such *individual*'s race, color, religion, sex, or national origin.' 42 U.S.C. §2000e-2(a)(1) (emphasis added). The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." *City of Los Angeles, Dep't of Water* v. *Manhart*, —— U.S. ——, ——, 98 S.Ct. 1370, 1375 (1978); see also *Furnco Construction Corp.* v. *Waters*, —— U.S. ——, ——, 98 S. Ct. 2943, 2951 (1978); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 51 (1974).

That Title VII protects whites as well as racial minorities from discrimination on the basis of race was established by this Court in *McDonald* v. *Santa Fe Trail Transportation Company*, 427 U.S. 273 (1976). In *McDonald*, Mr. Justice Marshall stated,

> Title VII of the Civil Rights Act of 1964 prohibits the discharge of 'any individual' because of 'such individual's race,' (citation omitted). Its terms are not limited to discrimination against members of any particular race. . . . This conclusion is in accord with uncontradicted legislative history to the effect that Title VII was intended to 'cover white men and white women and all Americans,' (citation omitted). . . .

427 U.S. at 278-280. *See Regents of University of California* v. *Bakke*, —— U.S. ——, ——, 98 S.Ct. 2733, 2811 n.12 (1978) (Stevens, J.); *Furnco Construction Corp.* v. *Waters*,

—— U.S. ——, ——, 98 S.Ct. 2943, 2951 (1978); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971); see also *Uzzell* v. *Friday*, 558 F. 2d 727 (4th Cir. 1977), vac. and rem'd —— U.S. —— (1978), reaff'd —— F.2d —— (4th Cir. Feb. 2, 1979).

Petitioners' arguments seem to boil down to the proposition that Respondent's rights may be subordinated because there is a lack of racial balance within the plant. But this Court supplied the answer to that proposition only last Term in *Furnco Construction Corp.* v. *Waters*, —— U.S. ——, ——, 98 S.Ct. 2943, 2951 (1978), when it said:

> It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force. See *Griggs* v. *Duke Power Co.* [401 U.S. 424, 430 (1971)]; *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 279 (1976).*

This Court's understanding of the Civil Rights Act of 1964 as expressed in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-31 (1971), should be dispositive of this case in Respondent's favor:

* This conclusion is all but compelled by §703(j) which provides in substance that nothing in Title VII shall require an employer to grant racial preference on account of a racial imbalance in the employer's work force. This section was part of the Dirksen-Mansfield compromise which resulted in the end of the Senate debate and the enactment of the Civil Rights Act of 1964. As Senator Humphrey explained in presenting it to the Senate:

> The proponents of this bill have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly.

110 Cong. Rec. 12295-12299 (1964).

> In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Here it is the fixed racial quota agreed to by Kaiser and the Steelworkers that has created a discriminatory racial barrier the removal of which is required by Title VII.

Similarly, if the issue were a constitutional one, which it would be if the racial quota were imposed because of governmental interference, whether by way of Executive Order No. 11246 or otherwise, the result would be the same.* As Mr. Justice Powell stated in announcing the judgment for the Court in *Regents of University of California* v. *Bakke*, —— U.S. ——, ——, 98 S. Ct. 2733, 2748 (1978):

> The guarantees of the Fourteenth Amendment extend to persons. Its language is explicit: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the 'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.' *Shelley* v. *Kraemer*, [334 U.S. 1 (1948)] at 22. Accord, *Missouri ex rel. Gaines* v. *Canada*, [305 U.S. 337 (1938)] at 351; *McCabe* v. *Atchison, T. & S.*

* Concepts such as academic freedom and a diverse student body held in *Bakke* to authorize a limited consideration of race by universities are not applicable here.

F. R. Co., 235 U.S. 151, 161-162 (1914). The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.

The racial quota here at issue is no less invidious because it would equally disqualify a black employee with a greater seniority than a white if his quota was already filled by a black with even greater seniority. In light of the longstanding (since 1969) hiring ratio "at the gate" of one black for one white, the possibility cannot be deemed a remote one. But, as this Court stated in *Shelley* v. *Kraemer*, 344 U.S. 1, 22 (1938):

> The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. It is, therefore, no answer . . . to say that the courts may also be induced to deprive white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

Indeed, there would seem to be little quarrel that if Title VII is the controlling law—and it clearly is—the Respondent is entitled to the relief that the courts below afforded to him. The Petitioners seem to argue, rather, that Title VII is overridden by the terms of the collective bargaining agreement between Kaiser and Steelworkers and by Executive Order No. 11246. It is these propositions that we address next.

II

The Collective Bargaining Agreement Cannot Deprive Respondent of His Title VII Right to Nondiscrimination in Employment.

Amici wholeheartedly support voluntary affirmative action by employers and unions to assist racial minorities within the context of equal opportunity for all people. It matters little whether the affirmative action is undertaken altruistically or as a result of government prodding so long as the affirmative action techniques employed do not impair or destroy the ability of others fairly to compete for opportunities.

But, where as here, the mechanism for assisting minority employees is a fixed racial quota which segregates by race the opportunities for admission to a job training program and subsequent advancement, there arises an irreconcilable conflict between affirmative action and the principle of non-discrimination mandated by Title VII that no theory of voluntarism can rationalize.

Petitioners use of such phrases as "voluntary compliance" and "zone of reasonableness" are meaningless under the facts of this case. Nor can their reliance on the recently adopted Equal Employment Opportunity Commission's Affirmative Action Guidelines* incorporating these concepts legitimate the fixed racial quota here at issue. Whatever "voluntary compliance" with an anti-discrimination statute may mean, it cannot mean an agreement to discriminate. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977). Nor can the term "rea-

* 44 Fed. Reg. 4421 (1979).

sonable" be applied to a fixed racial quota that by its very nature is arbitrary in its treatment of individuals.* This is particularly so where, as here, the record is barren of any attempt by Petitioners to formulate a less invidious method to allocate scarce training opportunities.**

It is unrealistic to assume, as did Judge Wisdom in his dissent,† that the union can be counted upon to protect the civil rights of its white members in the face of a collective bargaining agreement demonstrating the contrary. The quota here at issue arose primarily out of Kaiser's desire to avoid "vexatious litigation"‡ and the union's apparent desire to obtain an on-the-job training program for its plant members even at the cost of having racially segregated seniority lists for this purpose. The 50% ratio agreed upon by Kaiser and the Steelworkers bore no relation to population or work force statistics; it was greater than both. The quota was in turn keyed to a goal of achieving 39% minority representation in each craft, a figure far in excess of the percentage of minority craft workers in the surrounding area. It is not surprising, therefore, that both courts below viewed the quota as unlawful even if it had been court imposed.

* The quota is arbitrary even in its treatment of racial or ethnic groups. See Mr. Justice Frankfurter's discussion in *Hughes* v. *Superior Court,* 339 U.S. 460 (1950); see also *Regents of University of California* v. *Bakke,* 98 S. Ct. at 2751 (Powell, J.).

** For example, instead of using racially segregated seniority lists, Kaiser and the union could have based admission to the program on seniority in combination with other relevant factors such as job performance, skill, aptitude, physical ability and a variety of other job related criteria that could have provided some degree of flexibility and individual consideration.

† *Weber,* 563 F.2d at 233.

‡ *Weber,* 415 F. Supp. at 765.

Where, as here, self-interested voluntarism clashes with the principle of non-discrimination, the latter must prevail.

As already shown, the Title VII right of Respondent to nondiscrimination on the basis of race in his employment is an individual right not a collective one. It is, therefore, not subject to divestment or destruction by a collective bargaining agreement between the individual's employer and his labor union. This is the lesson of *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977). The rule of supremacy of Title VII over collective bargaining terms was stated with particularity in *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 51-52 (1974):

> We are also unable to accept the proposition that petitioner waived his cause of action under Title VII. To begin, we think it clear that there can be no prospective waiver of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. [Citations omitted.] These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for unit members. Title VII, on the other hand, stands on plainly different grounds, it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights

> under Title VII are not susceptible of prospective waiver. [Citation omitted.]

The proposition that labor unions are disqualified from imposing racial discrimination by agreement with employers is a longstanding holding of this Court. In *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U.S. 192, 203 (1944), the Court suggested that because the union operated under federally created collective bargaining powers, their contracting for racially biased terms verged on a constitutional violation:

> Without attempting to mark the allowable limits of differences in terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize bargaining representatives to make such discriminations. [Citations omitted.]

Whatever the power of employer and union "voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination" for specific victims of that discrimination, *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 778 (1976), they have no power to nullify an individual's right to nondiscrimination where, as here, the two courts below found an absence of past racial discrimination by Petitioners.

The collective bargaining process by itself cannot repeal or defy the plain congressional mandate of Title VII. This

seems to be recognized by the Petitioners in their attempt to dress up the agreement as an expression of "affirmative action" authorized if not compelled by Executive Order No. 11246. But as we show in Point III, Executive Order No. 11246 cannot be a license to Kaiser and the Steelworkers to do what Title VII prohibits.

III

Executive Order No. 11246 Cannot Be a License to Kaiser and the Steelworkers to Destroy Respondent's Individual Title VII Right to Be Free of Racial Discrimination.

The attempt to fall back on Executive Order No. 11246 as the device for destroying Respondent's clearly delineated right under Title VII to be free from racial discrimination transforms the issue from one of statutory construction to vastly larger constitutional concerns. The argument based on Executive Order No. 11246 plays the role of Hamlet's father's ghost in these proceedings and it is equally nebulous.

There was no finding of employment discrimination by the agency charged with the enforcement of the Executive Order. (The only evidence in the record sustained the conclusion of the two lower courts that there was no prior racial discrimination at Kaiser's plant.) Nor was there any specific order for "affirmative action" either to Kaiser or to the Steelworkers. Nevertheless, it is suggested that simply because the Executive Order exists, authority has been delegated to Kaiser and the Steelworkers to institute a fixed racial quota in order to effect a racial balance

even in violation of Title VII. There is, of course, no authority to support such a position.

Before addressing the questions intrinsic in the attempted repeal of Title VII by Executive Order No. 11246, it might do well to look at the substantive content of that Order. It provides, 30 Fed. Reg. 12319 (1965), in relevant part, only that: "The contractor will take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin." It is a broad jump from the terms of the Executive Order, which are perfectly consonant with the language and commands of Title VII, to read it as commanding racial discrimination in employment by way of a racial quota. The more natural reading is its consistency with Title VII in banning the racial discrimination inherent in the quota imposed by the collective bargaining agreement here at issue.

Such a reading preserves government encouraged affirmative action for racial minorities while recognizing the fundamental right of every individual to compete for employment opportunities free of racial discrimination—the essence of Title VII. Without the former, equal opportunity for all people might never become a living reality. Without the latter, progress in civil rights would be reduced to the level of political expediency and could prove ephemeral indeed.

If not read in a manner consistent with the nondiscrimination requirements of Title VII, the Executive Order No. 11246 raises the spectre of three substantial con-

stitutional questions, none of which has been directly resolved by this Court.

The three questions are: (1) Is Executive Order No. 11246 valid in the absence of either a constitutional or statutory base on which to rest? (2) Is an Executive Order which is in conflict with a statutory command superior to that statutory command? (3) Is an Executive Order valid that purports to impose a racial quota making employment rights dependent exclusively upon race, especially when there is no violation to which the quota might be addressed as a remedy? The answer to all three questions must be in the affirmative if Petitioners' claims as to the applicability of Executive Order No. 11246 to the facts of this case are to be sustained.

The principal authority invoked by Petitioners is a decision of a Court of Appeals that is clearly distinguishable. *Contractors Ass'n. of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159, 163-65 (3d Cir. 1971), involved a particular set of "goals" imposed on particular unions and employers by a federal agency that had made specific findings of prior racially discriminatory hiring practices. There is, thus, little similarity to the case at hand, where there is neither a finding of past discrimination nor action by an agency specifying a remedy for such discrimination.

The "Philadelphia Plan" in *Contractors Ass'n.,* moreover, was held by the Third Circuit to be concerned with flexible "goals" and not, as here, a fixed quota. These "goals" were concerned with increasing the number of minorities in a labor pool available for employment and it was specifically found in that case that there was no

conflict with Title VII, because: "Some minority tradesmen could be recruited, in other words, without eliminating job opportunities for white tradesmen." 442 F.2d at 173. The fixed quota imposed here could hardly qualify as a "goal," and it surely cannot be said that the quota did not in fact exclude Respondent from the training program in favor of a black applicant with less seniority solely because of his race.

It is implied that the necessary findings of discrimination to justify the racial quota as a remedy were implicitly made by the employer and the union. They have neither authority nor competence to perform that function. As Mr. Justice Powell said in *Regents of University of California* v. *Bakke*, —— U.S. ——, ——, 98 S.Ct. 2733, 2758-59 (1978):

> Petitioner does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. For reasons similar to those stated in Part III of this opinion, isolated segments of our vast governmental structure are not competent to make these decisions, at least in the absence of legislative mandates and legislatively determined criteria. [Citations omitted.] Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discriminations. [Citations omitted.] Lacking this capability, petitioner has not carried its burden of justification on this issue.

Surely, the labor union and the employer are hardly better positioned to exercise the governmental function that the

Medical School at Davis could not exercise "in the absence of legislative mandates and legislatively determined criteria."

We submit that the answer to each of the three questions is in the negative and if we are right on any of them, judgment for Respondent should be affirmed.

1. This Court has held that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579, 585 (1952). Here, as in *Youngstown*, the Executive Order in question is without either constitutional or statutory justification. It is a naked act of legislation by the executive branch, exactly of the kind held invalid in *Youngstown*. See *id.* at 588.

It is true that the Third Circuit in *Contractors Ass'n. of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159, 166-72 (1971), sustained the validity of the Order, but it did so by resorting to the standard in Mr. Justice Jackson's concurring opinion rather than the quoted standard announced by Mr. Justice Black in his opinion for the Court. There was not, as there could not be found any constitutional or statutory provision on which to rest the Order.

2. *Youngstown* also furnishes the answer to the second constitutional question raised by the assertion of the supremacy of the Executive Order over the mandate of Title VII, at least as that Order is interpreted by Petitioners. For even by the standards of the concurring Justices, who constituted a majority of the Court, an Executive Order

in conflict with national legislation must be subordinated to that legislation. See *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); Frankfurter, concurring, *id.* at 593; Douglas J., concurring, *id.* at 629; Jackson, J., concurring, *id.* at 634; Burton, J., concurring, *id.* at 655; Clark, J., concurring, *id.* at 660. "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . ." Article VI, §2, Constitution of the United States.

3. The arguments and proofs that a racial quota which does not purport to be a remedy for constitutional or statutory violations is itself unconstitutional is set out fully and cogently in Mr. Justice Powell's opinion in *Regents of University of California* v. *Bakke*, —— U.S. ——, 98 S. Ct. 2733 (1978). See *Swann* v. *Board of Education*, 402 U.S. 1 (1971); *Milliken* v. *Bradley*, 418 U.S. 717 (1974); *Evans* v. *Buchanan*, 555 F.2d 373 (3rd Cir. 1977).

A racial quota is an unconstitutional governmental tool because it tells us that the only attribute about a person that qualifies or disqualifies him for employment or other societal good is the color of his skin. The use of race as a surrogate for unidentified capacities or incapacities is both intrinsically invidious and factually false. The use of a racial quota pursuant to governmental mandate makes a mockery of America's long sought constitutional goal that all individuals are to be treated by the law as if there were no difference in the color of their skins.

None of the three constitutional issues mentioned here need be addressed by the Court if the plain meaning of Title VII is applied by the Court to the facts of this case. Certainly statutory construction should be preferred to constitutional adjudication here. *Ashwander* v. *T.V.A.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

IV

Whether or Not There Had Been Past Discrimination in Employment at the Kaiser Plant, the Racial Quota Imposed by the Collective Bargaining Agreement Would Be Invalid.

Petitioners have sought to turn Title VII on its head by asserting that deprivation of Respondent's Title VII rights are not at issue. For them, the question is whether a racial quota is an appropriate remedy for a statistical racial imbalance among craft workers at Kaiser's Gramercy plant even though actual discrimination is steadfastly denied, and no discrimination was found by the two courts below.

If there is a central meaning to be derived from the judgment of this Court in *Regents of University of California* v. *Bakke*, —— U.S. ——, 98 S. Ct. 2733 (1978), it is that a quota is not an approvable remedy under such circumstances. As Mr. Justice Powell wrote there, —— U.S. at ——, 98 S. Ct. at 2759:

> Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like the respondent, who bear no responsibility for

> whatever harm the beneficiaries of the special admissions group are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violation of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure or to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved. [Citation omitted.]

Surely the "discrimination" claimed here cannot afford a justification for "relief" beyond that which could be invoked to cure a statutory or constitutional violation, had there been one. It is clear from this Court's previous decisions that the racial quota invoked by the collective bargaining agreement could not stand even if used to cure defined violations of law.

As the Court of Appeals for the Fifth Circuit noted in its opinion: "The Supreme Court has never approved the use of a quota remedy." *Weber,* 563 F.2d at 220. Indeed, even in the case of a constitutional violation, this Court has said that a quota in terms of a fixed racial balance is a "remedy" beyond the discretion of a court to impose. The lesson of *Swann* v. *Board of Education,* 402 U.S. 1 (1971), and *Milliken* v. *Bradley,* 418 U.S. 717 (1974), was clearly stated by Judge Aldisert speaking for the Court of Appeals for the Third Circuit sitting *en banc* in *Evans* v. *Buchanan,* 555 F.2d 373, 379, 380 (3d Cir. 1977):

> Nor may a remedial desegregation order require "as a matter of substantive constitutional right, any particular degree of racial balance or mixing. . . . The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." *Swann* v. *Board of Education, supra,* 402 U.S. at 24. . . . If that language were not clear enough, the Supreme Court has more recently repeated that "[t]he clear import from this language in *Swann* is that desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each 'school, grade or classroom' " *Milliken* v. *Bradley,* 418 U.S. at 740-41. . . . Accordingly, and to avoid any possible misunderstanding, we expressly disapprove the 10-35% enrollment criterion, and we specifically hold that no particular racial balance will be required in any school, grade, or classroom.

This Court, moreover, has been absolutely consistent in its position that remedies for racial discrimination must be framed only to cure discrimination that violates the law. Thus, it has assured the restoration of victims of racial discrimination to their "rightful place," *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 779 n.41 (1976), or the right of such victims to be "made whole," *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 418 (1975). But even established acts of racial discrimination are not a license to the government, no less to an employer and union, to allocate benefits and burdens exclusively on the basis of race. If there were past illegal discrimination, the only appropriate remedy would be to restore those shown to be injured by illegal racial discrimination to the condition they would occupy but for the illegal discrimination. See, *e.g., Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 772-73 (1976); *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 364-71 (1977); *United Air Lines, Inc.* v. *Evans,* 431 U.S. 553, 558 (1977). Even under such circumstances, this Court has admonished the lower courts, in shaping a remedy to be mindful of the equities

of fellow employees who were not responsible for the discrimination. *International Brotherhood of Teamsters* v. *United States, supra* at 372. See *Regents of University of California* v. *Bakke,* 98 S. Ct. at 2751 n.34.

Whatever past inequities Petitioners may assert on facts outside the record, they provide no predicate for a fixed racial quota. Nor can the racially segregated selection process here at issue be justified as appropriate affirmative action, either voluntary or government required. If the principle of non-discrimination, so vital to the security of all minority groups, racial and otherwise, is not to become a legal fiction, Respondent must be confirmed in his on-the-job training post without an egregiously unlawful racial quota barring his way.

Conclusion

The civil rights movement and the body of law it inspired, aimed at eliminating racial inequities, are among the most significant and constructive developments in this nation's history. If the concept of affirmative action, voluntary and government inspired, has served as the stimulus for social progress, the principle of non-discrimination has provided the legal and moral underpinning for such progress. The latter teaches that every individual, regardless of race, is entitled to compete for opportunities on his or her own merits, not as a matter of political expediency or business convenience, but because discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong and destructive of democratic society. This fundamental truth must become an integral part of the mores of our society if we are ever to be free of racism.

Yet, in the impatience to complete the abolition of discrimination based on race there is the tendency to sacrifice principle for expediency—here the principle of non-discrimination itself—for the beguiling simplicity of a fixed racial quota. It would be self-defeating in the extreme, if legislation and executive decrees, which by their terms clearly afford no support for racial quotas, were held to countenance the invidious racial quota imposed here. The decision of this Court in this case may well determine whether the drift to a quota society will become a tragic reality.

Respectfully submitted,

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